No. 4
Ill. & Orig.
Reply Brf. of Springer for Defs. on Dem.

Office Supreme Court U.S.
FILED
MAY 5 1900
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed May 5, 1900.

No. 7, Original.

The State of Missouri,

COMPLAINANT,

VS.

The State of Illinois and The Sanitary District of Chicago,

DEFENDANTS.

Brief of Defendants in Reply to the Brief and Argument of Complainant in Opposition to the Demurrer of Defendants to Bill of Complaint.

WILLIAM M. SPRINGER,
of Counsel for Defendants.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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THE STATE OF MISSOURI, COMPLAINANT,

v.

THE STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, DEFENDANTS.

Brief of Defendants in Reply to the Brief and Argument of Complainant in Opposition to the Demurrer of Defendants to Bill of Complaint.

On the 28th day of April, at this term, counsel for Defendants in this case obtained leave of the Court to file within five days a brief in behalf of Defendants in reply to the brief and argument of Complainant in opposition to the joint demurrer of Defendants to the Bill of Complaint.

Counsel for Complainant submit in their brief seven points upon which they rely to support their Bill of Complaint as against the demurrer of Defendants. We will consider these points in their order.

First. Complainant's first point is that "the Supreme Court of the United States has original jurisdiction in all cases in which a State is a party."

Several cases are cited in support of this contention, among them Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265.

Counsel for Complainant also cite the Constitution of the United States, Art. III, Sec. 2, but make no reference to the Judiciary Act of 1789. By a section of that Act, which is preserved as Section 687 of the Revised Statutes of the United States, it was enacted as follows:

"The Supreme Court shall have exclusive jurisdiction of controversies of a civil nature, where the State is a party, except between a State and its citizens; and except also between a State and a citizen of another State or aliens, in which latter case it shall have original but not exclusive jurisdiction."

Complainant's counsel were unfortunate in citing in support of their contention the case of Wisconsin *v.* Pelican Ins. Co., *supra*. His Honor, Mr. Justice Gray, in announcing the decision of this Court in that case, used the following language:

"Yet, notwithstanding the comprehensive words of the Constitution, the mere fact that a State is a plaintiff is not a conclusive test that the controversy is one in which this Court is authorized to grant relief against another State or her citizens."

In that case this Court held that it did not have original jurisdiction, although a State was the plaintiff and a citizen of another State was the defendant, for the reason that the State could not invoke the original jurisdiction of the Supreme Court to enforce a pecuniary penalty for the violation of its municipal laws.

In the case of the State of Louisiana against the State of Texas, handed down at this term of Court on the 15th day of January, it was held: That this Court did not have

jurisdiction, for the reason that it did not appear from the bill of complaint that the controversy to be determined was a controversy arising directly between the State of Louisiana and the State of Texas.

Hence, it appears conclusively that the mere fact that a State is a party plaintiff and that another State or citizens of another State are parties defendant, does not make a case justiciable in this Court.

Counsel for Complainant concede one of these propositions in their brief, namely, "that to justify such original jurisdiction, the cause must be one in which a State is a substantial party, seeking to invoke a right of its own. Where a suit, though brought in the name of the State, is for others, jurisdiction will not obtain."

The second point made by counsel for Plaintiff is as follows:

"A public nuisance affecting the health or safety of a community may be abated by the State, by indictment or by information. Or, the State in the discharge of its duty and the exercise of its power to protect the public health, may resort to a court of equity for the more complete and adequate suppression of such nuisances by injunction. The bill in such case may be filed by the Attorney-General, or other law officer of the State, in its name or in his."

Numerous authorities are cited to support this doctrine.

Among other cases cited in support of this contention counsel for Complainant cite the case of the Ohio Oil Company, Plaintiff in Error, *v.* the State of Indiana, decided at this term of Court, the opinion by Mr. Justice White having been handed down April 9, 1900. That case illustrates and sustains the contention of counsel for Defendants in the case at bar. The State of Indiana, through its Attorney-General, filed a complaint in the

Circuit Court of Madison County, in that State, against the Ohio Oil Company, a corporation organized under the laws of the State of Ohio, and hence a citizen of that State. It was authorized to carry on its business in the State of Indiana. The State of Indiana had passed an act in the year 1893, making it unlawful for any person or corporation to allow or permit the flow of gas or oil from any oil or gas well to escape into the open air without being confined within the well for a longer period than two days next after the gas or oil shall have been struck in such well.

A section of the act provided that any person violating the provisions of the act, should be liable to a penalty of two hundred dollars for each and every such violation.

The State of Indiana, through its Attorney-General, filed a bill of complaint as stated, praying for a temporary injunction, and, upon final hearing, the injunction be made perpetual. The temporary injunction was granted, and upon final hearing in the State courts the injunction was made perpetual. The case was then appealed to the Supreme Court of Indiana, and by that Court it was affirmed. The case was brought to the Supreme Court of the United States upon the alleged ground that by the judgment of the Indiana courts, the defendant, the Ohio Oil Company, was deprived of its property without due process of law. Nowhere in the case was the question of jurisdiction raised. It was conceeded that the suit was instituted in the proper court. The case was affirmed in this court.

That was a case in which the State of Indiana brought a suit against a corporation which was a citizen of the State of Ohio. The suit was in equity, and prayed a perpetual injunction restraining the defendant from committing certain acts, which acts were alleged to have been

injurious to numerous persons in the State of Indiana owning coal and gas lands in the vicinity of the lands operated for coal and oil by the defendant corporation.

Now, if the contention of counsel for the Complainant in the case at bar is correct, the State of Indiana might have brought that suit in the Supreme Court of the United States, invoking its original jurisdiction, the Defendant being a citizen of the State of Ohio. In fact, the right of the State of Indiana to invoke the original jurisdiction of this Court in that case is just as clear and no more so than is the right of the State of Missouri to invoke the original jurisdiction of this Court in the case at bar. The acts of the defendant corporation were made unlawful by the Indiana statute, which prescribed penalties in the shape of fines for its violation, but there was no suggestion in the Indiana statute of the right of the State to enjoin in equity the unlawful acts mentioned in the statute. The Indiana case, although in form a suit in equity, was *quasi* criminal in its character, for the reason that it was based upon or grew out of a criminal statute of that State.

So it is with the case at bar; although in form a suit in equity, the right to maintain the suit is based upon the criminal laws of the State of Missouri, which provide for the suppression of nuisances. It would not be contended that the Indiana case above mentioned could have been brought in this Court as a court of original jurisdiction, and for the same reason it cannot be contended that the case at bar is justiciable in this Court.

It is unnecessary to review the other authorities cited. The proposition as stated by counsel for Complainant is not disputed. But counsel for Defendants contend that bills in equity for the suppression of nuisances by injunction, as in the case at bar, do not present civil controversies between States or between a State and citizens

of another State; and that cases of the kind cited by Complainant's counsel are *quasi* criminal in their nature and are in no sense civil controversies such as are contemplated in the Constitution of the United States. This Court laid down the correct rule upon this subject in the case of the State of Louisiana *v.* The State of Texas, decided at this term of Court, in which the Chief Justice stated as follows:

"The language of the second clause of the second section of Article III, 'in all cases in which a State shall be party' means in all the *enumerated cases* in which a State shall be a party, and this is stated expressly when the clause speaks of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated and those only."

The case of Complainant, as disclosed by the Bill of Complaint, is not one of the "enumerated cases" which may invoke the original jurisdiction of this Court.

That the Bill of Complaint in the case at bar does not present a civil controversy such as is contemplated by the Constitution, the cases cited in support of Complainant's contentions fully demonstrated. Many of them are in the name of the people, while others are brought by the Attorney-General, who merely stands for the people in the case.

Every proceeding for the abatement of a public nuisance is either criminal or *quasi* criminal in its nature. It cannot be regarded as a civil controversy. The proper and usual remedy for a nuisance, which is purely public in its character, is by indictment, brought on behalf of the pub-

lic by the proper officer. (14 Encyc. P. and P., p. 1093, and numerous authorities therein cited.)

Equity has jurisdiction to prevent or suppress nuisances, both public and private, where the nature of the case is such that ample redress cannot be offered by the ordinary tribunals. (Same, p. 1095.) But the proper method of redressing a public nuisance is ordinarily by indictment. The statutes imposing penalties for maintaining public nuisances are generally held not to supersede this common law remedy. (Same, p. 1096.) In all these remedies the object is the suppression of the nuisance, and whether the remedy be by indictment or by injunction, the nature of the proceeding is not changed. The remedy is either criminal or *quasi* criminal, and in neither case can it be said to present "a civil controversy," such as is contemplated in the Constitution, and in Section 687 of the Revised Statutes of the United States.

The third point in Complainant's brief is to the effect that "the Bill contains averments sufficient to entitle the State of Missouri to the equitable relief prayed for, if these averments are hereafter shown to be true."

The brief and argument of Defendants, in support of their demurrer, are sufficiently explicit upon this subject.

In the case of the State of Pennsylvania *v.* Wheeling and Belmont Bridge Co. *et al.*, 13 How. 518, this Court in rendering its opinion held, that the rights asserted and relief prayed for were considered as in no respect different from those of an individual. The State of Pennsylvania asked from this Court the protection of its property on the same ground and to the same extent as a corporation or individual may ask it. In that case the State of Pennsylvania alleged and proved that its pecuniary rights which were involved amounted to many millions of dollars, and it was the damage which was threatened to these

interests which caused this Court to take jurisdiction in that case.

The Bill of Complaint in the case at bar does not state facts sufficient to entitle Complainant to equitable relief. In support of this contention, counsel for Defendants cite their brief and argument filed herein, in support of objection to the granting of a preliminary or temporary injunction in the case. The contention of Defendants in this respect is clearly set forth in the brief mentioned, beginning on page 13, and it need not be reiterated here. There are many propositions cited in the brief last mentioned, which are not in point on the question of jurisdiction, or the question as to whether the Complainant has stated facts sufficient to entitle it to equitable relief. The brief was prepared in view of the fact that counsel for Complainant served a notice upon Defendants, that on the return day of this cause they would apply for a temporary injunction. It was for the purpose of opposing such temporary injunction that this last-mentioned brief was prepared and filed. As there were two briefs filed, counsel did not desire to repeat such matter as would be applicable to all of the contentions of Defendants, hence reference was made in each brief to certain propositions discussed in the other.

The 4th and 5th points contained in Complainant's brief and argument, are not material on the question of jurisdiction. The 6th point submitted by counsel for Complainant is as follows:

"No right to pollute a stream can be acquired by delay or even by prescription."

We are of the opinion that the Bill of Complaint in this case shows upon its face that the Complainant is guilty of *laches*. The Bill alleges as follows:

"And your orator shows that heretofore, to wit, in 1889, the State of Illinois enacted a law known as the Sanitary District Act, together with an act for the improvement of the Illinois and Des Plaines rivers, and that under said act of said State, the said corporation known as the said Sanitary District of Chicago, was organized and is now existing and operating, etc."

It is further stated in said Bill of Complaint that the Defendant, the Sanitary District of Chicago, "has constructed a channel or open drain from the west fork of the south branch of the Chicago river, in the City of Chicago and County of Cook, in the State of Illinois, to a point near Lockport, in the County of Will, in said State, where said channel or drain connects with and empties into the Des Plaines river." And further in said Bill of Complaint it is stated that the Sanitary District of Chicago, in the construction of said channel or drain, "cut through the natural ridge or water-shed which divides the basin of Lake Michigan from the basins of the Des Plaines and Illinois rivers and the basin of the Mississippi river, and having so constructed said channel and having about completed the same," * * * "Defendants now propose and threaten to receive into said channel or drain the sewage matter and filth of the Sanitary District of Chicago."

From these averments in the Bill of Complaint, it appears that the channel or sewage canal was completed in pursuance of an act of the Legislature of the State of Illinois, passed in 1889, and that the channel had been cut at the time the Bill was filed, through the water-shed, which divides the basin of Lake Michigan from the basins of the Des Plaines, Illinois, and Mississippi rivers, and that the Defendants now propose and threaten to receive into said channel or drain, the sewage matter and filth of the Sanitary District of Chicago.

Counsel for Defendants contend that upon the face of the Bill of Complaint, the Complainant has been guilty of unreasonable and inexcusable delay in asserting its right, if any it ever had, to enjoin the apprehended danger. The brief and argument of Defendants filed herein, in support of objections to the granting of a temporary or preliminary injunction in this case on page 31, and subsequent pages down to page 38, inclusive, fully support this contention. The apprehension of danger was just as great ten years ago as it was when the Bill of Complaint in this case was filed.

Counsel for Complainant cite the cases of Chapman *v.* City of Rochester, 110 N. Y., 273, and of Goldsmid *v.* Tunbridge Wells, 1 Eq. Cas. 161, in support of their contentions in reference to delay. The case of Chapman against the City of Rochester was an action brought in the State of New York, to restrain defendants from polluting a natural stream, which flowed through complainant's premises, and to recover damages caused thereby. The case was tried upon the question of damages, and a judgment of twelve hundred dollars was given in favor of the complainant for the injury he had already suffered, and he was granted an injunction to restrain the nuisance complained of.

The Court of Appeals, in affirming this judgment, stated as follows:

"Moreover, complainant is found to have sustained a special injury to his health and property from the same cause, and we find no reason to doubt that he is entitled to compensation for damages thereby occasioned and also to such a judgment as will prevent the further perpetration of the wrong complained of."

In support of this position the Court cited Goldsmid *v.* Tunbridge Wells, *supra*. This was an English case in

which the evidence established the fact that the sewage which flowed into the brook which passed through complainant's land injuriously affected the water in that branch, and also the water in the lake in the park of the complainant. The Chancellor, in passing upon that case, said: "Although the fact of prospective nuisance is not in itself a ground for the interference of the Court, yet if some degree of present nuisance exists, the Court will take into account its probable continuance and increase."

There is no allegation in the Bill of Complaint that the Complainant has suffered in any degree or that a present nuisance exists, and adopting the rule laid down in the Goldsmid case, this Court must hold that the mere fact of prospective nuisance is not in itself ground for interference of a Court of Equity.

Counsel for Complainant, in their brief on page 50, state: "In many respects the contentions of counsel for Defendants in the case at bar are identical with those advanced by counsel for the town of Tunbridge Wells; but more than that, the remarkable claim is here made, at one and the same time, that the bill is premature and that the bill is tardy."

If, as stated, the contentions of counsel for Defendants in the case at bar are identical with those advanced by counsel for the town of Tunbridge Wells, it is equally true that such contentions were approved by the Court in its opinion in that case; for in that case it was held that the fact of prospective nuisance is not in itself good ground for interference in a court of equity. It is true, as stated, that counsel for Defendants make the claim, however remarkable it may be in the opinion of counsel for Complainant, that the case at bar is at the same time premature and tardy. It is premature for the reason that

no nuisance existed or was alleged to have existed at the time the Bill of Complaint was filed. In order to entitle the Complainant to equitable relief, it must have alleged and proven that it had sustained damages. Or if the Complainant is entitled to equitable relief on the ground of apprehended danger, such right should have been asserted as soon as possible after the apprehension of danger was apparent and known to Complainant. The doctrine stated in Defendant's brief on pages 37 and 38, based upon decision of the Supreme Court of Nebraska, in the case of Clark *v.* Cambridge and Arapahoe Irrigation and Improvement Company, 45 Neb. 808, is universally recognized and is supported by an array of authorities, which does not admit the possibility of an opposite contention.

It is not stated in the Nebraska case that the complainant, who is guilty of *laches*, has no remedy. It is only stated that he is not entitled to equitable relief, that is to say, that he will not be entitled to an injunction such as is invoked in the case at bar. It is stated that the complainant "will be left to pursue his ordinary legal remedies." To that condition is the Complainant in the case at bar left. It must pursue, since it has delayed so many years, legal remedies, if any it may have. It must bring its action in a court of law, but not of equity, and it must establish before a jury actual damages, and obtain a judgment therefor, as in the case of Chapman against the City of Rochester, before application for injunction will be entertained.

The other points submitted by counsel for Complainant are sufficiently answered by the briefs and arguments of Defendants heretofore filed in the case.

Counsel for Defendants insist that this Court has not

original jurisdiction to hear and determine this case; and even if it should have original jurisdiction, the Bill of Complaint does not state facts sufficient to entitle the Complainant to the equitable relief prayed for therein.

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Of Counsel for Defendants.